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IN THE

Supreme Court of the United States

No. 562

MILTON E. SPATT,

Appellant,

—against—

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York, and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

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STATEMENT

Appellant appeals from a final judgment of the Supreme Court of the State of New York, County of Kings, entered on the 22nd day of May, 1963, pursuant to the remittitur and decision of the Court of Appeals of the State of New York dated May 2nd, 1963, which affirmed the order and judgment of the Appellate Division of the State of New York, Second Judicial Department.

The order and judgment of the Appellate Division of the State of New York, Second Judicial Department, reversed the judgment of the Supreme Court of the State of New York, County of Kings.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is reported at 13 N. Y. 2d 618, 240 N. Y. S. 2d 605. The opinion of the Appellate Division of the State of New York, Second Judicial Department is reported at 14 A. D. 2d 30, 218 N. Y. S. 2d 409. The opinion of the Trial Court is reported at 24 Misc. 2d 978, 203 N. Y. S. 2d 549.

Copies of the foregoing opinions are attached hereto as Appendix "A", pages A-1 to A-8, *infra*.

JURISDICTION

This is an action for a judgment declaring the regulations of the Comptroller of the City of New York issued under the New York City Compensating Use Tax Law as well as its underlying statute to be invalid as they apply to the purchase price of an automobile where part of the consideration is a trade-in used car. This action is authorized by Section 473, Civil Practice Act, State of New York.

The Court of Appeals held that the Comptroller of the City of New York could levy a greater tax on a resident who purchased an automobile outside the City of New York when he pays part of the purchase price with a traded in car, than a resident who makes the identical purchase within the City of New York. The Court held, in fact, that the Comptroller had the right to discriminate against the out

of town purchaser because there was a basis for the classification.

The issue is whether or not the discriminatory tax is offensive to the Constitution of the United States, particularly the 14th Amendment. The Trial Court held that the statute denied the plaintiff due process of law and equal protection of the laws as guaranteed by the 14th Amendment of the United States. The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, reversed the judgment of the Trial Court and held that there was sufficient basis for the classification of taxpayer. The Court of Appeals of the State of New York affirmed the Appellate Division in a brief memorandum opinion.

The Court of Appeals rendered its decision on May 2nd, 1963. The judgment, pursuant to the remittitur of the Court of Appeals was entered on May 22nd, 1963. Notice of appeal to the Supreme Court of the United States was timely served and filed in the Supreme Court of the State of New York, County of Kings, on the 11th day of July, 1963, the Court in which the record is filed.

The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28, United States Code, Section 1257 (2); Federal Code Annotated, Title 28, Section 1257 (2). The following decisions sustained the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the State of New York, based on the remittitur of the Court of Appeals of the State of New York on direct appeal (*Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577; *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450; *Memphis Steam Laundry Cleaners, Inc.* v. *Stone*, 342 U. S. 389; *Nippert* v. *City of Richmond*, 327 U. S. 416; *Freeman* v. *Hewit*, 329 U. S. 249; *Lathrop* v. *Donohue*, 367 U. S. 820; *King Manufacturing Co.* v. *City Council of*

Augusta, 277 U. S. 100; *Independent Warehouses* v. *Scheele,* 331 U. S. 70).

The regulation of the Comptroller of the City of New York, Article 42, and the provisions of the Administrative Code of the City of New York, Section M. 41—16.0, N41-1.0, N41.20, are the statutes which are under attack in this appeal. Copies of the regulation and statute are annexed hereto as Appendix "B".

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether or not the City of New York, through its Comptroller, may apply its complementary—sales tax—use tax scheme, so that the burden thereof bears more heavily upon a resident taxpayer who purchased without the City of New York than one who makes the identical purchase within the City of New York;

2. Whether or not the Supreme Court of the State of New York may constitutionally render a judgment which approves and authorizes the City of New York to discriminate between residents of said City so as to tax the residents of said City differently solely on the basis of the situs of the purchase;

3. Whether or not the regulations of the Comptroller of the City of New York pursuant to the Administrative Code of the City of New York, which require residents of the City of New York to be taxed more heavily when the purchase of an automobile is made outside of said City, than a resident who makes the identical purchase within the City, is offensive to and repugnant to and violative of the Constitution of the United States, including but limited to the following clauses thereof:

a) *The Due Process Clause,* being a portion of the Fourteenth Amendment of the Constitution of the United States;

b) *The Equal Protection of the Laws Clause,* being a portion of the 14th Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Briefly, appellant, a resident of the City of New York, purchased an automobile in Nassau County, New York State (outside the City of New York) for the sum of $8,250.00, and brought the automobile back with him for use within the City of New York. In making the purchase, the appellant traded in his used car and received a credit of $4,900.00. Therefore, he paid the balance of $3,350.00 in cash.

Instead of paying a compensating use tax on the full amount of the purchase, as required by the local tax law and the regulations of the Comptroller of the City of New York, appellant paid a use tax of $100.50 computed on only the cash amount of the purchase. As a result, the Comptroller of the City of New York assessed appellant the sum of $147.00, the balance alleged to be due on the use tax.

It is agreed by all parties that had the appellant made this identical purchase and trade-in within the City of New York, the sales tax due would have been computed solely on the cash consideration paid. In other words, in a use tax situation, the tax is computed on the entire purchase price, including the credit for the value of a similar article traded in. In the sales tax situation, only the cash consideration is the tax base, as the value of a traded in similar article is not included.

The sole basis for this differential tax treatment is alleged to be based upon an increase in cost of enforcement; stimulation of sales within the City of New York; and the likelihood that the traded in vehicle would be purchased within the City of New York and subject to another sales tax. However, nowhere in the record is there any factual basis for these conclusions.

HOW FEDERAL QUESTIONS WERE PRESENTED

Appellant commenced an action for a declaratory judgment to declare the regulations and underlying statutes unconstitutional, in violation of both the constitutions of the United State and the State of New York. This contention was raised in the initial pleadings and in all the Appellate courts.

The following is quoted from the appellant's complaint in the instant action:

> "TWELFTH: That the said regulation is illegal, invalid, void, not binding upon the plaintiff, and unconstitutional in that it violates the Constitution of The State of New York and the United States by denying to the plaintiff the equal protection of the laws for the reason that the classification by the Comptroller in the said Article 42 is capricious, arbitrary, discriminatory, and class legislation in relation to the plaintiff.
>
> "THIRTEENTH: That the said regulation is invalid, void, not binding upon the plaintiff, and violates the Constitution of the State of New York and the United States by depriving plaintiff of his property, without due process of law and for a public purpose without just compensation."

The Appellate Division of the Supreme Court of the State of New York stated, in the opinion of the Court, that the constitutional issues were raised therein. The Court said:

> "Heavier taxes on nonresidents than on residents have been held not violative of the equal protection clause which they might be regarded as: (a) payment for rendition of public services which had been availed of (Travellers' Ins. Co. v. Connecticut, 185

U. S. 364; Haavik v. Alaska Packers Assn., 263 U. S. 510); (b) an attempt to bring back business loss as the result of a prior tax system or a means by which to defray extra cost of collection (Madden v. Kentucky, 309 U. S. 83); (c) encouragement of location within the state of useful industries (Allied Stores of Ohio v. Bowers, supra); or (d) a means of inducing the labor population to remain (William v. Fears, 179 U. S. 270, 276)."

The Court of Appeals in its decision stated:

> "There was sufficient basis for the classification for a different tax treatment of trade-in automobiles in transactions taking place outside the City of New York by reason of the greater cost of enforcing the compensating use tax and the greater likelihood of resale of the used car within the City of New York. We pass on no other question."

THE QUESTIONS ARE SUBSTANTIAL

In a recent decision of this Court, it was held that a similar discriminatory tax was an unconstitutional burden on interstate commerce (*Halliburton Oil Well Cementing Company* v. *State of Louisiana*, 373 U. S. 64). That case was decided eleven days after the decision of the Court of Appeals of the State of New York in holding the tax in the instant case valid. In *Halliburton*, the discrimination was effected by imposing labor and overhead as part of the cost basis for the use tax, but excluding it from the cost basis in the sales tax. The effect in both *Haliburton* and the instant case is to make the taxpayer under the use tax pay a greater tax than the taxpayer under the sales tax.

In the factual pattern of this case, there was no interstate transaction. However, the Comptroller's regulations and Administrative Code apply with equal force to an out

of State purchaser as to a purchase within the State. Thus, there can be no question that the statute as it applies to an out of State purchaser is prohibited under the *Haliburton* doctrine.

Since the instant transaction, as stated before, was made only within New York State, appellant's main thrust has been the denial of equal protection of the laws. The classification upon which the tax scheme of the New York City use—sales tax is based, is arbitrary and capricious.

It should be pointed out firstly that the standard of discrimination of the Equal Protection Clause of the Constitution of the United States and the Commerce clause of the United States are equal and co-terminus (*Gregg Dyeing Co. v. Query*, 286 U. S. 472 at p. 482). Thus, the conclusion of this Court in *Halliburton, supra*, that such a tax is violative of the Interstate Commerce Law would necessarily mean that it is a discrimination and in Violation of the Equal Protection Clause of the Constitution of the United States.

There are definite standards required to justify a classification, even in the field of taxation. In order to claim a greater cost of enforcement to validate this tax, there must be some evidence to show the difference in enforcement, and the additional tax must be commensurate with the additional cost (*Mullaney v. Anderson*, 342 U. S. 415). The additional tax is over twice as much as the tax for a resident paying the sales tax. Yet, the resident who purchases a car outside of New York City for all cash pays exactly the same tax as the resident who purchases the car in New York City for all cash. The only time there is a difference is when the resident makes the purchase outside of New York and pays part of the consideration with a trade-in. Thus it is apparent that the additional tax is not for enforcement but rather for discrimination. Further, the additional tax is not based upon the cost of enforcement but rather on the value of the trade-in car. So if the pur-

chaser trades in a late model Cadillac, the tax difference will be many times greater than if the purchaser trades in an old model car.

The appellee's theory is that the likelihood of resale within the City of trade-in car involved in the sales tax justifies the classification. Such theory is speculative and no factual support for this is found on the record. When such speculation as this is the basis for a classification, it is arbitrary. After all, an arbitrary classification is one in which there is no reasonable basis. If speculation, such as indulged by the Comptroller, is allowed, the need of showing fact support disappears.

The issue presented by this appeal has never been considered by this Court. Yet millions of taxpayers throughout the United States are faced with this tax. In New York State alone, the Municipalities of Auburn, Niagara Falls, Niagara Falls School District, Poughkeepsie, Syracuse and Watertown, and the Counties of Browne, Cheming Erie, Jefferson and Monroe, have similar tax statute (CCH State Tax Reporter, New York Vol. 2, Pars. 72-200 to 77-008). In addition, the following states have the same discriminatory tax. Kansas (CCH, All State Sales Tax Reporter, Vol. 2, Pars. 37-519 and 3) 604; Colorado (*ibid.* Vol. 2, Pars. 26-502 and 26-550); North Dakota (*ibid.* Vol. 3, Pars. 59-596 and 59-654); Mississippi (*ibid.* Vol. 3, Pars. 46-029 and 46-308).

These governments continue to enforce collection of this unconstitutional tax despite the well reasoned opinion in *Commonwealth* v. *Smith,* 75 Dauph. 22 (Pa. CP. 1960) (appeal withdrawn). In this case the court held that exactly the same tax imposed by the State of Pennsylvania to be an unconstitutional burden on Interstate Commerce. Further, in a well reasoned Law Review Article, concerning this precise case, the author concluded that such a tax violates the Equal Protection Clause as well, in those cases where inter-

state commerce is not involved (37 NYU Law Review 306). The author stated, at pages 314-315:

> "Computing the sales tax on the purchase price less the value of property traded-in, while denying a similar deduction in computing the use tax is an unreasonable policy. It discriminates against a class of taxpayer as well as interstate commerce, and is thus invalid as violating both the equal protection clause and where relevant, the commerce clause."

CONCLUSION

It is submitted that the position of taxpayer Milton E. Spatt, is completely sound: that no existing authority to the contrary exists anywhere: that the Constitution of the United States strikes down the position of the Comptroller of the City of New York, which is arbitrary and capricious and violative of the commerce clause of the Federal Constitution and of the Fourteenth Amendment thereof.

It is further submitted that the issues here are most substantial; that the federal questions are of nationwide importance; that this Court ought to give plenary consideration to this case to put at rest the constitutional validity of this largely used but discriminatory tax on similar residents, and that a substantial federal question (whether the taxing authority may discriminate in intrastate transactions in a manner which would be violative of the commerce clause) ought to be heard on its merits, upon a brief and oral argument, and finally decided by this high Court.

CHARLES E. BERNSTEIN,
Attorney for Appellant.

APPENDIX A

(Decision by Court of Appeals)

Judgment affirmed with costs. There was sufficient basis for classification in the different tax treatment of trade-in automobiles in transactions taking place outside the City of New York by reason of the greater cost of enforcing the compensating use tax and the greater likelihod of resale of the used car within the City of New York. We pass upon no other question.

All concur.

(Opinion by Appellate Division)

SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

NOLAN, *P. J.*, BELDOCK, UGHETTA, PETTE and BRENNAN, *JJ.*

UGHETTA, *J.*:

Pursuant to an enabling act (L. 1934, ch. 873, as amd.; McKinney's Unconsolidated Laws, §§ 9901, 9902), the City of New York has a sales tax on personalty purchased by its residents within its corporate limits (Administrative Code of City of New York, §§ N41-1.0—N41-21.0), and, complementing it, a use tax on personalty purchased by its residents without its confines (Administrative Code, §§ M41-15.0—M41-37-0). The sales tax, as originally enacted in 1934 (Local Laws, 1934, No. 20 of City of New York) was imposed on the full price. But by amendment in 1935 (Local Law, 1935, No. 29 of City of New York) Sec. 1 there was exempted from the sales tax "the credit allowed for property of the same kind accepted in part payment and intended for resale." Unlike the sales tax, the use tax is applicable

to the total consideration given or contracted to be given for such property or for its use.

Insofar as concerns the purchase of an automobile, the basic difference between the sales tax and the use tax is crystallized in Article 42 of the Regulations of the City Comptroller, entitled *Rules* and *Regulations, City Sales and Compensating Use Taxes.* It is there provided, in effect, that under the sales tax (which is collected by the vendor), if a vendor sells an automobile and accepts a trade-in for which he makes an allowance, only the balance of the price after allowance for trade-in is taxable. On the other hand, where a resident purchases an automobile without the City, he is required under Article 42 of such Rules to pay a use tax based on the total purchase price, irrespective of part payment by a trade-in. The vendor, who is not within city jurisdiction, does not collect the use tax.

Here, plaintiff, a resident of the City, purchased an automobile in this State outside of the City. He brought it back for use within the City. Instead of paying a use tax on the full purchase price, plaintiff paid a tax only on the net price or balance after deducting the allowance or credit for the trade-in value of his used car. An assessment was made against him by the City for a claimed additional tax, based on the full price.

The Special Term has granted to plaintiff a summary judgment declaring void the challenged rules and enjoining the collection of the tax on the trade-in value, holding (24 Misc. 2d 978) that these differing taxes do not afford a resident equal protection of the laws (U. S. Const., 14th Amdt., § 1; N. Y. Const., art. 1, § 11). We reach a contrary conclusion.

Since the transaction here occurred in different cities but within the same State, no issue is presented under the commerce clause as to whether the discrimination constituted an undue burden on interstate commerce (cf. *McLeod* v.

Dilworth Co., 322 U. S. 327, 330, 331; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480-482).

The principles which govern consideration of a tax, challenged as denying equal protection, are settled. The taxing authority may apply the flexibility and variety appropriate to reasonable schemes of taxation, so long as the differing classifications rest on a reasonable basis (*Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 526-528). If any state of facts reasonably can be conceived to sustain the distinction in taxation there is no constitutional violation (*Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357). "The question of constitutional validity disappears when it cannot be said that no state of facts reasonably justifying the classifications can be conceived" (*Matter of 436 W. 34th St. Corp.* v. *McGoldrick*, 288 N. Y. 346, 350). In the absence of proof or common knowledge to the contrary (cf. *Mullaney* v. *Anderson*, 342 U. S. 415), or in the absence of patent arbitrariness in the distinction, a rational basis for the differing classifications will be presumed (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 210).

Heavier taxes on nonresidents than on residents have been held not violative of the equal protection clause where they might be regarded as: (a) payment for rendition of public services which had been availed of (*Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510); (b) an attempt to bring back business lost as the result of a prior tax system or a means by which to defray extra cost of collection (*Madden* v. *Kentucky*, 309 U. S. 83); (c) encouragement of location within the state of useful industries (*Allied Stores of Ohio* v. *Bowers*, *supra*); or (d) a means of inducing the labor population to remain (*William* v. *Fears*, 179 U. S. 270, 276).

In *Madden* v. *Kentucky* (*supra*, p. 93), the authority of *Colgate* v. *Harvey* (296 U. S. 404) was expressly overruled. It had been held in the latter, in declaring violative of the equal protection clause an exemption from state income tax

of interest on money loaned within but not without the state, that justification for the distinction on the ground that money loaned within the state will generally be invested there, was too speculative.

In *Allied Stores of Ohio* v. *Bowers* (358 U. S. 522, *supra*) the authority of *Wheeling Steel Corp.* v. *Glander* (337 U. S. 562) was distinguished solely on the narrow ground (cf. concurring opinion, p. 533) that, in providing for taxation of accounts receivable of nonresidents but not of residents, the state had expressly set forth the purpose of the discrimination to be a scheme of reciprocity; hence, the state left no room to conceive of a rational basis for the classification.

The distinction between the sales and use taxes of the City is justifiable here on the conceivable grounds, *inter alia*, of: (1) encouragement of sales within the City (*Allied Stores of Ohio, supra; William* v. *Fears, supra*); (2) greater cost of enforcing the use tax, which involves a check on automobile registrations in all the counties of the State; and (3) probability of resale of the used trade-in automobile within the City as opposed to probability of its resale without the City (*Madden* v. *Kentucky, supra*).

The order and judgment should be reversed on the law, with $10 costs and disbursements; plaintiff's motion for summary judgment should be denied; and summary judgment in favor of the defendants dismissing the complaint, with costs, should be granted, pursuant to Rule 113 of the Rules of Civil Practice.

Nolan, *P.J.*, Pette and Brennan, *JJ.*, concur;

Beldock, *J.*, not voting.

Order and judgment reversed on the law, with $10 costs and disbursements; plaintiff's motion for summary judgment denied; and summary judgment in favor of defendants dismissing the complaint, granted, with costs.

(Decision of Mr. Justice Hart)

(Vol. 144 New York Law Journal, Page 8, July 12, 1960.)

Spatt v. City of N. Y.—The complaint herein alleges that on December 21, 1957, plaintiff purchased a motor vehicle in the City of Long Beach for a total consideration of $8,250, consisting of $3,350 in cash and a used motor vehicle valued at $4,900 by him and the vendor of the new vehicle. Plaintiff, a resident of Kings County, thereupon paid to the City of New York $100.50 representing 3 per cent of the cash consideration of the transaction as a compensating use tax, but refused to pay $197.81 as tax on the $4,900 representing the value of the vehicle traded in. On September 21, 1959, a warrant was issued to the Warrant Agent of the City of New York.

The complaint alleges that defendant City, by various officers and agents named as defendants, purportedly is acting pursuant to article 42 of the Rules and Regulations of the New York City Sales Tax and Compensating Use Tax which are invalid. It is contended that the invalidity of these regulations stems from the fact that they provide that sales within the city limits be taxed to the extent of the cash consideration involved over and above the trade-in value of an article of the same kind accepted by the vendee with the intention of resale, while in a like transaction outside of the City of New York the entire sales price is taxed at the same rate without any allowance for the trade-in value of the personal property delivered as part payment of the purchase price. It is alleged that the regulation is void since it is violative of plaintiff's rights under the State and Federal Constitution in that it denies the plaintiff the equal protection of the laws for the reason that the classification provided for is capricious, arbitrary, discriminatory and consists of class legislation in relation to plaintiff, and also deprives plaintiff of property without due process of law.

The relief demanded is a judgment declaring null and void the regulation insofar as it requires plaintiff to pay a higher tax on a vehicle purchased outside the City of New York than he would on a like purchase within the city, declaring void the warrant issued by the city and for an injunction restraining its execution.

Since the primary issue involved is the constitutionality of the regulation resort to the remedy of a declaratory judgment is most appropriate (*Dun & Bradstreet, Inc.* v. *City of N. Y.*, 276 N. Y. 198; *Comm'r of Public Charities of the City of Hudson* v. *Wortman*, 255 App. Div. 241; *Board of Education of the City of Rochester* v. *Van Zandt*, 119 Misc. 124, aff'd 234 N. Y. 644).

There being no questions of fact raised by the pleadings or by the affidavits submitted by the parties on the instant motion for summary judgment, the matter may be disposed of as a question of law.

The court is constrained to agree with plaintiff that the regulation (as well as the statute on which it is predicated, but which is not directly challenged in the complaint) discriminates against extra-territorial purchases denying the equal protection of the law to those residents of the city who consummate such transactions outside the city limits. The classification, as a tax basis, is arbitrary, capricious and discriminatory. Fundamentally the tax involves identical transactions, the only difference being in the situs thereof. It is just as discriminatory as if such transactions were exempt from tax when consummated in the city but taxed as to those consummated outside the city limits or if higher rates were applied to the latter than to the former.

The City attempts to justify its position by urging first that the sales tax and use tax are two different taxes. In its brief, however, it admits in effect that the use tax merely complements and implements the sales tax since it was "designed to prevent the loss of sales tax revenue to the

city resulting from New York City residents making their purchases outside the city" by imposing a tax on the use of such property within the city by residents. The circumstance that the sales tax and the compensating use tax were passed at different times is not conclusive. They are component parts of one tax scheme and structure (*cf. Jacobs* v. *Joseph*, 282 App. Div. 622). This is evidenced by the fact that pursuant to the statute (Administrative Code, sec. M-31-17.0 [3]) the use tax is inapplicable to any transaction on which a sales tax is payable. The City also contends that there is a reasonable basis for the distinction between the two similar transactions; that a purchase in the city involving a trade-in might result in two sales tax payments, one on the purchase of the new car taxed for the cash differential and the second when the used car was sold, whereas if the transaction were consummated outside the city the article traded-in might not be resold inside the city limits or outside the city to a New York City resident. This reasoning, however, is entirely speculative and such speculation may not be the basis for classification. The assumption that a subsequent purchaser may pay a tax in order to afford an exemption from tax within the territorial limits of the jurisdiction of the taxing authority has been held to be so speculative as to preclude the validity of the differential or exemption created by a taxing statute (*People* v. *Carpenter*, 2 Ill. 2d 468). There the use tax was placed on motor vehicles purchased in other jurisdictions by residents of Illinois but none was imposed on those purchased from dealers in Illinois. The justification for the exemption to the latter was on the "tacit assumption that such dealers have paid the retailers occupation tax * * * and on the further assumption that such tax was passed on to the purchaser. These are pure assumptions" (pp. 373-374). The court rejected this argument on the ground that there was no proof that the tax was passed on to resident purchasers. Similarly here, the basis for exemption from taxation of part of the consideration where the transaction is consum-

mated in the City of New York is based on "tacit assumption" which is patently speculative and, accordingly, may not be the basis for the discriminatory effect of the tax.

There being no valid basis for the classification established, plaintiff is accordingly entitled to judgment. Settle judgment on notice.

APPENDIX B

(Statutes Involved)

TITLE M

ARTICLE 2

COMPENSATING USE TAX

§ M41-16.0 Imposition of tax.—

b. On and after June twenty-fourth, nineteen hundred forty-nine, there is hereby imposed and there shall be paid by every person a tax on the use within the city (1) of any tangible personal property purchased at retail, (2) of any tangible personal property however acquited where not acquired for purposes of resale, if improved, refashioned or enhanced in value by the performance of processing services upon said property by another, and (3) of any information services involving the furnishing of printed, mimeographed, multigraphed matter or matter duplicating written or printed matter in any other manner, other than professional services and services of employees, agents or other persons acting in a representative or fiduciary capacity, or information services furnished to newspapers. Such tax shall be at the rate of two per centum until April thirtieth, nineteen hundred fifty-one, and on and after May first, nineteen hundred fifty-one, at the rate of three per centum of the consideration given or contracted to be given for such property and for such processing or information services, or for the

use of such property, plus the cost of transportation except where such cost is stated and charged separately. "Processing services" shall mean and include the services of producing, fabricating, processing, printing and, except for the imprinting of copy upon an already printed product, imprinting performed upon the tangible personal property of another, other than the services rendered in connection with the repair, alteration or reconditioning of such tangible personal property to refit it for the use for which it was originally produced. "Information services" shall mean and include all services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons (Subd. b amended by L. L. 1959, No. 54, July 1).

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§ N41-1.0 Definitions.—When used in this title the following terms shall mean or include:

* * * * *

4. "Receipt." The amount of the sale price of any property or the charge for any service specified in section N41-2.0 of this title valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any * * *

§ N41-2.0. Imposition of tax.—a. On and after July first, nineteen hundred thirty-eight and ending on June thirtieth, ninteen hundred fifty-five, there shall be paid a tax upon the amount of the receipts from every sale in the city, as follows:

(Opening par. amended by L. L. 1952, No. 71, July 1; L. L. 1953 No. 61, July 1.)

1. Two percent upon the amount of the receipts from every sale of tangible personal property sold at retail, except those articles described in schedule "A" of this section. * * *

SALES TAX

Article 42 of the Rules and Regulations of the New York City Sales Tax and Compensating Use Tax:

(A) Sales Tax on purchases within the city:

"Where tangible personal property is sold at retail and credit is allowed for property of the same kind of which is accepted by the vendor in part payment of the sales price and is intended for resale by the vendor, the sales tax is to be computed upon the net receipts after deduction of the trade-in-allowance."

(B) Compensating Use Tax on purchases without the city:

"Where tangible personal property, the use of which is subject to the Compensating Use Tax, is purchased at retail and credit is allowed for other property which is accepted by the vendor in part payment of the sales price, the Use Tax is to be computed upon the total selling price of the property sold without any allowance for the property accepted by the vendor as part payment, notwithstanding that the property accepted is intended for resale by the vendor."